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RESIDENTIAL BUILDERS: WORKMANSHIP

Senate Bill 351 (Substitute H-1) First Analysis (6-19-01)

Sponsor: Sen. Glenn D. Steil
House Committee: Regulatory Reform
**Senate Committee: Human Resources
and Labor**

THE APPARENT PROBLEM:

Article 24 of the Occupational Code provides for the regulation and licensure of residential builders. Under provisions of Article 24, a complaint can be filed against a licensed residential builder for any of 13 actions listed in the article. If a licensed builder is found in violation of the code, he or she could be subject to penalties prescribed in the code; for instance, license sanctions or fines. Though most of the actions for which a complaint may be filed are fairly straightforward, such as abandonment of a construction project, insolvency, and a willful violation of the state's building laws, a complaint may also be filed against a licensee for "poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official."

Reportedly, the subjective nature inherent in complaints involving claims of "poor workmanship" have led to several problems. For example, industry members and the Department of Consumer and Industry Services (DCIS), which has authority under Article 5 of the code to receive and investigate complaints against licensed residential builders, report that complaints filed by homeowners are often vague – inadequately explaining why they believe that poor workmanship is involved, what remedy they are seeking, and what attempts have been made to resolve their dispute with the builder.

To file a complaint against a licensed residential builder, which must be made within 18 months after completion, occupancy, or purchase of the residential structure, whichever occurs later, a homeowner must contact the department and obtain a complaint package. The complaint package includes a building inspection report, which must be given to a local building inspector for completion. The building inspection report requires the inspector to enter information regarding the nature of the complaint, location, and whether there is an issue of

workmanship, code violation, or no violations. Reportedly, this stage of the complaint process is also problematic, as some reports completed by inspectors do not identify specific grounds for a complaint, but instead simply state "poor workmanship" or report only on whether or not there is a code violation.

It has been suggested that a more effective complaint process could be developed that would aid in the resolution of disputes involving claims of "poor workmanship" by requiring more specific information and by encouraging alternative dispute resolution procedures to be placed in the written contracts between homeowners and licensed residential builders.

THE CONTENT OF THE BILL:

The bill would amend Chapter 24 of the Occupational Code to establish procedures for filing complaints against licensed residential builders. The bill would specify that, notwithstanding Article 5 of the code, the following administrative proceedings regarding workmanship would apply. (Article 5 contains provisions concerning complaints, hearings, and petitions generally applicable to licensed occupations.)

- A complaint submitted by an owner would have to describe the factual basis for the allegation in writing to the satisfaction of the Department of Consumer and Industry Services (DCIS). The owner would have to send a copy of the initial complaint to the licensee (builder) at the same time it was sent to the department.
- The department would have to presume the innocence of the builder throughout the proceeding until the administrative law hearing examiner found otherwise in a determination of findings of fact and conclusions of law under Article 5. The builder

Senate Bill 351 (6-19-01)

would have the burden of refuting evidence submitted by a person during the course of the administrative hearing. The builder would also have the burden of proof regarding the reason deficiencies had not been corrected.

- Upon receipt of a building inspection report issued to the department by a state or local building enforcement official who is authorized to do so under the Stille-DeRossett-Hale Single State Construction Code Act, the bill would require the department to send, by certified mail, a copy of the verified complaint to both the homeowner and the builder. A “verified complaint” would be a complaint in which all or a portion of the allegations have been confirmed by the building inspection report. The building inspection report would have to verify or confirm the substance of the complaint. The department would be prevented from assessing a fine against the builder under Article 6 of the Occupational Code (concerning violations and penalties) if the copy of the verified complaint was not sent within 30 days of the department receiving the building inspection report. However, the department could still pursue restitution, license suspension, or other remedies provided under the code.

- A builder could contractually provide for an alternative dispute resolution procedure to resolve complaints filed with the department. The procedure would be conducted by a neutral third party in order to determine the rights and responsibilities of the parties. It would have to be initiated by the builder, who would have to provide the homeowner with a notice of the initiation of the alternative dispute resolution procedure by certified mail not less than 30 days before the procedure was scheduled to commence. The procedure would have to be conducted at a location that was mutually agreed to by the parties.

- The department could not initiate a proceeding against a builder if that builder had contractually provided for an alternative dispute resolution procedure that had not been utilized and completed unless the following had been determined:

- the builder had not complied with a decision or order issued as a result of that alternative dispute resolution procedure;

- that alternative dispute resolution procedure was not fully completed within 90 days after the complaint had been filed with the department; or

- an alternative dispute resolution procedure that met the requirements under the bill was not available to the homeowner.

- In a manner acceptable to the department, the homeowner would have to demonstrate that notice had been provided to the builder describing reasonable times and dates that the residential structure was accessible for any needed repairs and also provide acceptable proof that the repairs had not been made within 60 days after the notice was sent. This provision would not apply to situations where the department determined a necessity to safeguard the structure or to protect the occupant’s health and safety. In such a case, the department could utilize any remedy available under Section 504(3)(a)-(d) of the Occupational Code (e.g. a formal complaint, a cease and desist order, a notice of summary suspension, or a citation).

- If the owner and builder had agreed contractually on mutually acceptable performance guidelines that related to workmanship, the department would have to consider those guidelines in its evaluation of a complaint. The guidelines would have to be consistent with the Stille-DeRossett-Hale Single State Construction Code Act.

Finally, if the person who brought a complaint against a builder failed to utilize a contractually provided alternative dispute resolution procedure, it would be considered an affirmative defense to an action brought in a state court under Article 24 against the builder.

MCL 339.2411 and 339.2412

HOUSE COMMITTEE ACTION:

The House committee adopted a substitute that would allow a licensee (builder) to contractually provide for an alternative dispute resolution procedure to resolve complaints regarding workmanship, require the builder to initiate the procedure and notify the homeowner at least 30 days before the procedure was to begin, and allow the Department of Consumer and Industry Services to initiate a proceeding against a builder if an alternative dispute resolution procedure meeting the bill’s requirements were not available to the homeowner who filed the complaint. The substitute bill would also define the term “verified complaint”.

BACKGROUND INFORMATION:

Publications on workmanship criteria. According to information supplied by the Michigan Association of

Home Builders, there are several publications that contain performance guidelines for construction and remodeling projects. These publications list guidelines concerning workmanship criteria as well as corrective measures for particular projects. For instance, if the exterior siding separates, the corrective measure would be for the builder to replace it unless the condition was caused by the homeowner's negligence. Reportedly, some hardware stores carry such publications. In addition, a publication by the National Association of Home Builders (NAHB) regarding residential construction and remodeling, Residential Construction Performance Guidelines, is available to builders for distribution to their customers. (A pack of 10 copies of a 36-page booklet designed for consumers is \$62.50 plus tax and shipping.) Consumers can purchase a larger contractor's edition for \$31.25, plus tax and shipping, from www.builderbooks.com or phone 1-800-223-2665. The NAHB states that the publications are guidelines that represent industry standards, but are not statements of law.

Complaint forms on the Internet. Information on how to file a complaint can be found on the web page of the Department of Consumer and Industry Services at www.cis.state.mi.us/bcs/enf/file.htm. A link to download the forms package for filing a complaint against a builder can be found at www.cis.state.mi.us/bcs/enf/forms.htm. ("BCS" in the web address identifies the Bureau of Commercial Services, and "enf" identifies the enforcement division within the bureau.)

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill could reduce costs to the state to the extent that a provision to prohibit the Department of Consumer and Industry Services, under conditions outlined in the bill, from initiating a proceeding against a licensee reduced the caseload for such proceedings pending before the department. Therefore, the bill would result in an indeterminate decrease in state costs. The provision to require the department to send certified mail copies of verified complaints to both the homeowner and licensed builder would impose minor costs on the department; these costs, however, would likely be met out of existing resources. There would be no fiscal impact on local governmental units. (6-18-01)

ARGUMENTS:

For:

The current system of filing complaints against builders for poor workmanship needs to be restructured. According to industry members and departmental staff alike, the current system often leads to complaints described in vague terms and local building enforcement officials often simply check whether a job project meets current code requirements. Failure to meet code requirements is a different issue than poor workmanship; a poorly done construction or remodeling project can still meet code requirements. Another problem involves the subjectivity of determining if a project was poorly done; workmanship, as is beauty, appears to be in the eye of the beholder.

The bill would aid homeowners and licensed builders by creating incentives for builders to contractually provide for alternative dispute resolution procedures to resolve complaints alleging poor workmanship. An alternative dispute resolution procedure would be a mutually agreed upon mediation process. It would be conducted by a neutral third party and held at a location convenient to both parties. The benefit to the builder is that the department could not initiate a proceeding against him or her while the procedure was in progress, except for conditions outlined in the bill. The benefit to the homeowner would be a quicker resolution than the longer process of an administrative hearing. Also, the bill would allow mutually acceptable performance guidelines relating to workmanship to be included in the contract. Both parties would know the standard of performance expected by the builder. This provision would help homeowners to have a clearer idea of the standards for good workmanship; be more informed about available remedies; and be more knowledgeable about filing complaints and pursuing resolution. If the homeowner believed that the builder did not perform up to those guidelines, the department would have to consider those guidelines in its evaluation of a complaint.

For:

The bill would establish a procedure by which homeowners and builders could contractually agree to an alternative dispute resolution procedure. Currently, complaints filed with the DCIS trigger an investigation and resolution process that includes mediation. If the parties fail to reach an agreement in the mediation process, then the case is heard before an administrative law judge. Agreeing to use an alternative dispute resolution procedure can save time

and money for all involved. However, if the parties cannot resolve the dispute with the alternative procedure, the complaint can still be brought before the department for resolution. The bill would not eliminate the administrative procedures currently in place to resolve disputes between builders and homeowners with regard to workmanship issues, but would provide and encourage the use of a less costly and involved method of resolving those disputes.

For:

Builders maintain that complaints regarding poor workmanship are often vague. Also, though a complaint must be filed with the department within 18 months of the completion of the project or the homeowner taking occupancy, it may be longer than that before the builder gets the first notice that someone is not satisfied with the quality of the project. It can be difficult to refute a claim regarding a project that is barely remembered because of the length of time that has passed and the number of other projects completed during that period. The bill would provide a remedy by requiring that homeowners describe the factual basis for the complaint to the satisfaction of DCIS in the initial complaint. This will help mitigate the subjective nature of poor workmanship claims. Secondly, the homeowner would have to send a copy of the initial complaint to the builder at the same time it is sent to the department, which would give the builder timely notice of a customer's dissatisfaction.

Builders also complain that at times homeowners will not give them additional access to the home to make any necessary repairs. Under the bill, the homeowner would have to give notice to the builder that described reasonable times and dates that he or she could make the repairs. However, if the builder did not make the repairs within 60 days of receiving the notice, then the homeowner could supply that information to the department for its use in determining action against the builder. Basically, the bill would clearly delineate the responsibility of each of the parties. In this way, proof can easily be established as to the attempts by either party to reach a reasonable settlement. Such documentation should enable mediation attempts, whether by the alternative procedure or by the department, to be conducted fairly and more efficiently than the present system.

Against:

Though the bill allows performance guidelines relating to workmanship to be included in contracts between homeowners and builders, and also to be considered by the department in resolving conflicts,

many homeowners may be ignorant as to what constitutes poor workmanship, and therefore could be disadvantaged in negotiating such terms. Perhaps the bill could include a reference to one or more of the manuals on the market or available through home builders associations that list workmanship criteria and reasonable correction measures.

Response:

The same end could be accomplished through administrative policy, such as requiring copies of this information to be distributed to potential customers by builders before a contract is drawn and signed. Also, information could be posted on the department's web site that such information is available to homeowners and where such information could be found.

POSITIONS:

The Department of Consumer and Industry Services supports the bill. (6-18-01)

The Michigan Association of Home Builders supports the bill. (6-18-01)

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.